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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY RAYMOND CRUZ,

Defendant and Appellant.

H026936

(Santa Clara County
Super. Ct. No. 195602)

ORDER MODIFYING OPINION
AND DENYING REHEARING
NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on January 21, 2005, be modified in the following particulars:

On page 4, the second paragraph, the fourth sentence, delete the references to *People v. Toro* and *People v. Daya* and adding the following after the sentence “Defendant’s silence . . . constituted acceptance of the waiver” and before the last sentence, “There was no error”:

“[A] custody credit waiver may be found to have been voluntary and intelligent from the totality of the circumstances, even if the sentencing court failed to follow the ‘better course’ of specifically advising the defendant regarding the scope of his waiver. [Citation.]” (*People v. Arnold* (2004) 33 Cal.4th 294, 306.) Even in cases where the court has the duty to advise the defendant of the consequences and elicit waivers on the record, the absence of specific advice on the record does not automatically invalidate the waiver, admission or plea, if the record otherwise shows from the totality of circumstances that it is voluntary and intelligent. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) “No doubt the better course is to specifically advise the defendant on the record concerning the scope of a waiver of credits, as the court did in *People v. Ambrose*, *supra*, 7 Cal.App.4th 1917. In *Ambrose*, the court required the defendant to waive any

right to custody credit for the time spent in a drug rehabilitation program as a condition of probation. The court specifically warned the defendant that if he violated probation again he would go to state prison and would not receive any credits for the time he had been in custody. [Citation.] If the trial court takes the time to create such an unequivocal record, the scope of the waiver is explicit, and not vulnerable to later retraction, when the defendant is faced with state prison. [¶] Nevertheless, having carefully reviewed the entire record, we are confident that appellant understood at the April 22 hearing that he was waiving his prior custody credits” (*People v. Salazar, supra*, 29 Cal.App.4th at p. 1554.) We are equally confident that defendant understood that he would not receive any credits for the time he had been in the treatment program if he was subsequently sentenced to state prison. There was no error.

The petition for rehearing is denied. There is no change in judgment.

Dated: _____

Premo, J.

Rushing, P.J.

Elia, J.